No. 89-420

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JESSE M. MUSLIU

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WALTER SHARE
7414 Orin Ct. N.
Seattle, Washington 98103
(206) 522-2020

WILLIAM P. BRYSON
810 W. 2nd Avenue
Anchorage, Alaska 99501
(907) 276-8611

Attorneys for Petitioner

QUESTIONS PRESENTED

A. The 9th Circuit used the wrong standard to hold a prejudicial accusation -- first exposed to the jury during deliberation -- was harmless, by viewing the evidence most favorable to the Government. This Court, in Turner v. Louisiana, 379 U.S. 466 and Marshall v. U.S., 360 U.S. 310 and most Circuits, require a new trial whenever there is a "possibility of prejudice," viewing the evidence most favorable to the defense. The error denied a fair trial, cross examination, an impartial jury, and rights to counsel.

B. The 9th Circuit erred by not permitting the record of the brother of the Government's key witness, which was relevant to motive, in violation of rights to cross examination, and Davis v. Alaska 415 U.S. 308.

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STATUTES AND AMENDMENTS RELIED UPON

Fifth Amendment, U.S. Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury ... nor be deprived of life, liberty, or property without due process of law. ...

Sixth Amendment, U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. Section 1952:

> Interstate and Foreign Travel or Transportation.
> (a) whoever travels interstate or foreign commerce ... to ...
> (3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any unlawful activity, ...
> ... and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3) shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both. ...

Federal Rule 404(b):

> Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.
> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motiver, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

I. INTRODUCTION

Petitioner, MR. MUSLIU, requests review of the 9th Circuit opinion of U.S.A v. Musliu v. __ f.2d__ (9th Cir. 88-3009, 4/10/89, rehearing denied 6/8/89.

II. OPINION BELOW

U.S.A. v. Musliu, supra, appears in Appendix I.

III. JURISDICTION

Petitioner was convicted in the Federal District Court at Anchorage, Alaska, under 18 USC, Section 1952, for traveling with intent to possess cocaine. The 9th Circuit denied rehearing on June 8, 1989. This petition is timely filed within 60 days. Jurisdiction is pursuant to 28 U.S.C. 1254(1).

IV. STATEMENT OF THE CASE

A. INTRODUCTION AND SUMMARY OF ARGUMENT

MR. MUSLIU was convicted, in Anchorage Alaska, for interstate travel with intent to obtain cocaine. MR. MUSLIU never possessed cocaine. It was only **travel** with intent to obtain cocaine that was charged. [ER 79]

During deliberation, a tape was re-played for the jury. The Government failed to turn off the tape and a prejudicial accusation against MR. MUSLIU was first heard by the Jury, which had not been played at trial, pursuant to a pre-trial agreement. The tape was turned off after the accusation, making it appear MR. MUSLIU adopted it, even though context showed he never did. Since the accusation was first heard during deliberations, MR. MUSLIU could not cross examine, or argue the context.

The 9th Circuit found "harmless error," by applying the wrong standard, first placing the

burden on MR. MUSLIU to show prejudice, and then presuming the jury believed the Government's witness and viewed an ambiguous recording most favorable to the Government.

By contrast, this Court and most Circuits, require a new trial if there is a "possibility of prejudice," -- viewing the evidence most favorable to the defense -- whenever improper evidence invades the jury. Turner v. Louisiana 379 U.S. 466 (1965); U.S. v. Marshall 360 U.S. 310, at 313 (1959). This Court also requires evidence be viewed favorable to the defense, to determine harmless error. Francis v. Franklin, 105 S.Ct. 1965 (1985); Connecticut v Johnson 460 U.S. 73 (1983); Rose v Clark 83 L.Ed 2d 1 640 (1986). The 9th Circuit further upheld the refusal to permit examination regarding the record of the brother of the Government's star, which was relevant to his motive to set up MR. MUSLIU.

B. THE FACTS AT TRIAL

The Government argued MR. MUSLIU flew from Anchorage to Seattle to obtain 1/2 kilo of cocaine, which MR. MUSLIU hid in the door of Stringfellow's jeep, which had been worked on at MR. MUSLIU's auto shop. [ER 5]

The defense was that MR. MUSLIU traveled from Anchorage to Seattle, for legitimate auto business, and did not learn of cocaine in the jeep, until after he arrived in Seattle and was told by Stringfellow. [ER 215, 236] The defense argued that Stringfellow and his brother Patrick, placed the cocaine in the jeep to set up MR. MUSLIU, to obtain a deal for Patrick, who was facing drug charges. [ER 236]

Stringfellow testified that he and his brother, Patrick had worked with police before. [ER 155] Stringfellow admitted they first pointed the finger at MR. MUSLIU, in hopes of getting a deal for Patrick's drug charges. [ER

115] Police, however, refused to deal with the Stringfellows until they had "proof." [ER 163]

Stringfellow later re-contacted police, this time claiming "proof." Stringfellow told police that when he picked up the jeep from MR. MUSLIU's auto shop, his passenger window did not roll down and he discovered cocaine hidden in the door. [ER 123] Stringfellow told Police MR. MUSLIU asked them to make a stop in Canada, on the way to Seattle, and paid gas money. [ER 113] The Stringfellows re-contacted the police in Patrick's case, to cut a deal for setting up MR. MUSLIU. [ER 127] The F.B.I. retrieved the cocaine and the Stringfellows were instructed to drive to Seattle. [ER 132]

Stringfellow called MR. MUSLIU from Seattle and told him they had not stopped in Canada. [ER 133] MR. MUSLIU was <u>not</u> upset and <u>never</u> mentioned cocaine. [ER 133] Three weeks later, MR. MUSLIU called to say he was coming to

Seattle. [ER 33] Again, MR. MUSLIU did not mention cocaine. When MR. MUSLIU arrived in Seattle, Stringfellow picked him up at the airport. No recording was made of this meeting. According to Stringfellow, he told MR. MUSLIU the Jeep was with a friend, and MR. MUSLIU told him there was cocaine in the jeep. [ER 136]

Arrangements were made to take MR. MUSLIU to the jeep, the next day. [ER 140] The F.B.I. brought the jeep to Stringfellow's house and placed a bag of sugar in the door panel. [ER 143] Stringfellow and MR. MUSLIU drove to a town near Seattle, to examine the jeep.

This time, a recording was made of the conversation. [ER 146] At trial portions of the recording were played. [ER 146] The recording of MR. MUSLIU and Stringfellow indicated MR. MUSLIU already had been told of the cocaine. The portions played to the jury, however, did not clarify if MR. MUSLIU learned of the cocaine

before or after he traveled to Seattle. [ER 149] MR. MUSLIU discussed his "surprise" at the airport, that he didn't "expect" things "to go wrong," and that "its in a perfect spot" [ER 149] These conversations, however, do not make it clear when MR. MUSLIU learned of the cocaine.

After the above conversation, Stringfellow and MR. MUSLIU arrived at the jeep. MR. MUSLIU tried to roll down the window. When it did not work, he removed the door panel, pulled out the bag of sugar and was arrested. [ER 154]

Significant evidence supported the defense that the Stringfellows set up MR. MUSLIU to obtain a deal for Patrick. Witnesses testified MR. MUSLIU came to Seattle to buy a vehicle for his auto business. [ER 233] MR. MUSLIU's fingerprints were not on the bag of cocaine. It made no sense for MR. MUSLIU to wait 3 weeks to recover cocaine, if he knew of it, and never state concern, even when Stringfellow stated he

was going to sell the jeep. [ER 133, 229] Stringfellow conceded MR. MUSLIU told him he did not know of drugs and speculated "his nephew put the cocaine in the jeep." [ER 136] Stringfellow admitted he went to police to get a deal for his brother, Patrick. [ER 162]

When Stringfellow first talked with MR. MUSLIU, after his arrival in Seattle, it was not recorded. [ER 149] There was ample time for Stringfellow to tell MR. MUSLIU of the cocaine, after his arrival. Stringfellow never got MR. MUSLIU to admit he knew of cocaine before coming to Seattle on any recording.

C. DAMAGING EXTRINSIC ACCUSATION GIVEN THE JURY DURING THE PLAYBACK

During deliberation, the jury requested a playback of the tape of Stringfellow and MR. MUSLIU. [ER 64] The Government re-played the tape, but failed to turn it off on time. [ER 66]

As a result, an inadmissable accusation by Stringfellow against MR. MUSLIU, was played to the jury which had not been played at trial, pursuant to pretrial agreement. [ER 136] The accusation was the only evidence, which stated MR. MUSLIU hid the cocaine in the jeep before he came to Seattle, and stated:

> STRINGFELLOW: you're a god damn body man, you know more about hidin' the shit than I would. [ER 66]

This accusation, was the last thing the jury heard in playback. The tape was stopped immediately after this accusation, thus taking the accusation out of context. Out of context it appeared as if MR. MUSLIU adopted the accusation. In context, however, MR. MUSLIU did not adopt it, and was never given a chance to respond, since Stringfellow immediately changed the subject. The jury was not given this context, and was left to presume the accusation was adopted. Since the accusation was played

after evidence and argument, counsel could not address the context of this damaging accusation. The jury returned a guilty verdict "within minutes" of hearing the accusation. [ER 20-34] Before verdict, counsel moved for a mistrial. [ER 250]

D. PRIOR RECORD OF PATRICK

During trial, counsel for MR. MUSLIU attempted to question Stringfellow of his knowledge of his brother's convictions. Patrick had 4 prior criminal charges. [ER 160] The defense argued Patrick's record showed a strong motive to set up MR. MUSLIU, since Patrick faced felony charges as a repeat offender. [ER 169] While testimony showed Patrick faced charges, the trial court precluded exploring his extensive criminal history. [ER 160]

V. REASONS FOR GRANTING THE WRIT

A. THE 9TH CIRCUIT USED THE WRONG STANDARD TO RULE THE JURY'S EXPOSURE TO PREJUDICIAL ACCUSATIONS, DURING DELIBERATION, WAS HARMLESS.

The 9th Circuit erred, by viewing the evidence in a light most favorable to the government, to find harmless error, where the jury was first exposed to prejudicial accusations during deliberation. Since the jury exposure occurred after evidence and argument, MR. MUSLIU was denied the most basic of rights to an unbiased jury, cross examination and argument as guaranteed by the 5th and 6th Amendments. This court and most Circuits require a new trial whenever there is a "possibility of prejudice," viewing the evidence favorable to the defense.

This court has repeatedly held that an impartial jury must decide a case based only on the evidence presented at trial. Turner v.

Louisiana 379 U.S. 466 (1965); U.S. v. Marshall 360 U.S. 310, at 313 (1959); Parker v. Gladden 385 U.S. 363, 364 (1966); Hamm v. South Carolina 409 U.S. 524 (1973); Peters v. Kiff 407 U.S. 493 (1972). This Court has not hesitated to reverse, where extraneous evidence reaches the jury during deliberations, if there is even the possibility of prejudice. U.S. v. Marshall, supra; Turner v. Louisiana, supra.

In U.S. v. Marshall, supra, a newspaper noted the defendant's criminal record, and was read by jurors. While jurors had assured they would not be influenced, this Court refused to view the evidence in a light most favorable to the Government, and ordered a new trial based on the "possibility" of prejudice:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when the evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence...It may indeed be

greater for it is then not tempered by protective procedures. Id at 313.

In Turner v. Louisiana, Supra, this Court reversed and found the possibility of prejudice, where the prosecution's key police witness also watched over the jury during deliberations. No improper comment or evidence actually reached the jury. Nevertheless, this Court again declined to construe the record in the light most favorable to the Government, and reversed, based on the possibility of prejudice, stating:

> Trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness in a public courtroom where there is full judicial protection of the defendant's right to cross examination and of counsel. Id at 472-473.

In Parker v. Gladden, supra this Court reversed where a bailiff made comments during deliberation. This Court, however, also would not presume an absence of prejudice. Rather the possibility of prejudice by itself, mandated a

new trial.

Since the Jury was first exposed to the accusation during deliberation, MR. MUSLIU never could cross examination or argue and thus was denied effective counsel. Denial of counsel mandates reversal, regardless of prejudice. Holloway v.Arkansas 435 U.S. 475 (1978); Glasser v. U.S. 315 U.S. 60 (1942):

> ...to determine the precise degree of prejudice sustained by Glasser ...is at once difficult and unnecessary. The right to assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial...Holloway v. Arkansas, supra, at 488

Most Circuits require a new trial, where evidence invades the jury during deliberations, if a "possibility of prejudice" exists. Most Circuits presume prejudice, unless the

Government shows to the contrary. /1

The requirement of a new trial whenever there is a "possibility" of prejudice and the reason why a heavy burden must be placed on the Government was succinctly stated by one Circuit,

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1 U.S. v. Greene 834 F.2d 86 (4th Cir. 1987) (reversed, where documents inadvertently sent to the jury possibility effected verdict); U.S v. Brown 832 F.2d 128 (9th cir. 1987) (reversed, where tape played without defendant present, since "possibility" agent's demeanor during the playback effected jury); Gibson v. Clanon 633 F.2d 851 (9th Cir. 1980) (reversed, where jury consulted dictionary during deliberation); U.S. v. Aguon 813 F.2d 1413 (9th Cir 1987);(reversed, where juror had conviction for similar charge); U.S. v. Eubanks 591 F.2d 513 (9th Cir 1979) (reversed, where juror possibly effected since family member convicted of related offenses); U.S. v. Perkins 748 F.2d 1519 (11th Cir 1984); (reversed, where a juror knew defendant and contradicted his testimony); U.S. v. Titsworth supra. (new trial, where broadcast for missing witness overheard by juror even though similar evidence admitted, since broadcast might have emphasized missing witness); Bulger v. Mclay 575 F. 2d 407 (9th Cir 1978); (reversed, where newspaper possibly considered by jury); U.S. v. Costello, supra. (new trial, where a juror conducted his own experiment);

in reversing a murder conviction:

... When a jury considers facts that have not been introduced in evidence a defendant has ...lost rights of confrontation, cross examination and assistance of counsel ... In one sense the violation may be more serious than where rights are denied at some other stage...because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut or a curative instruction, to discuss the significance in argument, or to take other tactical steps to ameliorate its impact. Gibson v Clanon, 633 F.2d 851, 855 (9th Cir. 1980)

The 9th Circuit, in the instant case, found harmless error since "overwhelming" evidence established MR. MUSLIU's guilt. [Opinion 8-9] The accusation, however, was the only evidence MR. MUSLIU knew of the cocaine before coming to Seattle, and this was the only issue at trial.

The 9th Circuit, applied the wrong test to find harmless error. The 9th Circuit, assumed the jury believed Stringfellow, even though he was uncorroborated and admitted trying to cut a deal, and presumed the jury viewed ambiguous recordings most favorable to the government.

While the 9th Circuit, noted the standard of "possibility of prejudice," [Opinion 7], but then expressly placed a "significant burden" on MR. MUSLIU, to show error, and analyzed the evidence, in a light favorable to the Government. [Opinion 4]

The 9th Circuit concluded that MR. MUSLIU's defense was "highly suspect." [Opinion at 11] This ignores the fact that Stringfellow admitted trying to "set up" MR. MUSLIU. The opinion relied on Stringfellow's testimony, that he was paid gas money by MR. MUSLIU concluding ..."It is unlikely that Musliu would offer to pay [Stringfellow] for his trip unless...to transport the hidden cocaine..." [Opinion at 8] This presumes the jury believed Stringfellow.

The 9th Circuit relied on Stringfellow's testimony, that MR. MUSLIU told him at the airport there was cocaine in the jeep. [Opinion at 8] The 9th Circuit, again presumes the jury

believed Stringfellow, even though not one shred of evidence corroborated his account, and it was equally likely Stringfellow told MR. MUSLIU at the airport of the cocaine. It was for the jury, not the 9th Circuit, to decide if Stringfellow was lying.

The opinion relied on ambiguous transcripts played to the jury. For example, the 9th Circuit noted MR. MUSLIU, stated the cocaine was "in the perfect spot." and went straight to the cocaine. [Opinion at 10-11] This did not, however, show MR. MUSLIU knew of the cocaine before traveling to Seattle, since it was possible Stringfellow told him in the unrecorded conversation at the Seattle airport.

The 9th Circuit pointed to the portion of the transcript which read:

STRINGFELLOW: "The bad part of it is you gotta ...Make an extra trip just to come down ...And do it over again".
MR. MUSLIU: "I can't believe it. That's hell." [Opinion at 9]

The opinion concluded the above meant MR. MUSLIU was upset he must ship the cocaine "again" to Canada. The ambiguous language, however, equally indicated MR. MUSLIU was upset he had to drive during rush hour from Seattle to Stringfellow's house, only to turn around and "again" drive back to Seattle. At other parts of the transcript, MR. MUSLIU lamented the long drive through rush hour traffic.

The 9th Circuit relied on the fact that MR. MUSLIU, in the transcript, stated he "didn't expect this to go wrong" and was "surprised at the airport." [Opinion at 10] The opinion concluded MR. MUSLIU was "surprised" that Stringfellow gave the jeep to a friend. It was equally plausible, however, MR. MUSLIU was "surprised" to learn of cocaine, for the first time, after arriving Seattle, thus making him innocent of traveling interstate with intent to possess cocaine.

By contrast to the above ambiguous recordings, the accusation exposed to the jury during deliberations, was the only evidence that MR. MUSLIU hid the cocaine in the jeep before coming to Seattle. The accusation was the last thing heard by the jury. It clearly influenced the jury who returned a verdict minutes later.

Contrary to the 9th Circuit, Stringfellow's uncorroborated and self-motivated story and the ambiguous recordings nowhere show "overwhelming evidence" MR. MUSLIU learned of cocaine before coming to Seattle.

The 9th Circuit's improper application of the harmless error rule is inconsistent with this Court's recent rulings in Francis v. Franklin, 105 S.Ct. 1965 (1985); Connecticut v Johnson 460 U.S. 73 (1983); and Rose v Clark 83 L.Ed 2d 1 640 (1986). These cases hold an appellate court should not substitute its opinion for the jury to find "harmless" error

where the error might impact the jury.

The impact of the extrinsic accusation denied MR. MUSLIU the essence of a fair trial. This Court should review the ruling of the 9th Circuit to insure the integrity of the jury system and to insure that the harmless error doctrine is not incorrectly applied so broadly as to abrogate the right to a jury.

B. THE EXCLUSION OF STRINGFELLOW'S CRIMINAL HISTORY

The 9th Circuit refused to permit cross exam on the record of Patrick, even though critical to show motive. MR. MUSLIU was thus denied his right to cross examine his accuser, as guaranteed by the 5th and 6th Amendments. Davis v.Alaska 415 U.S. 308 (1973); U.S. v. Nixon 518 U.S. 683 (1974).

The opinion concludes that ..."although Patrick's prior convictions has some relevance

to [Stringfellow's] motivation to cooperate with authorities it was of minimal value..." [Opinion at 12] Stringfellow's desperation, however, could not be fully explained to the jury absent Patrick's record. While the jury learned Patrick faced pending charges, they did not learn he was going to be sentenced as a repeat offender with a lengthy record.

The government capitalized on this very issue, by arguing in closing that it made no sense for the Stringfellows to set up MR. MUSLIU with the expense of 1/2 a kilo. Police, however, never would have cut a deal with a "repeat" offender such as Patrick, unless the Stringfellows could land a larger fish. It was important to explain to the jury that this meant planting a large amount of cocaine to convince police to let Patrick go.

Patrick's record was admissable under the 5th and 6th Amendments, and Federal Rule 404

(b), to show motive. In Davis v.Alaska, supra this Court reversed, where the trial court refused to permit cross examine of a juvenile's criminal record, which also showed his motive as a key Government witness. This Court stated:

> The accuracy and truthfulness of Green's [state's witness] testimony were key elements ...The claim of bias which the defense sought to develop was admissable to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer as well as Green's concern that he might be a suspect... Id at 317.

This Court in Davis, supra, held a reviewing court should not speculate as to the impact on a jury, when a defendant is denied the right to fully explore bias. Id at 317-318. The importance of cross examination is increased ..."When the witness the accused, seeks to cross-examine is the star government witness." U.S. V.Calle 822 F.2d 1016 (11th Cir. 1987). Circuit cases have upheld the admission of prior

crimes under 404 (b). /2

In Heath v. Cast, 813 F.2d 253 (9th Cir. 1986) the record of the brother of a Government witness was found admissable to show bias. The Circuit court explained:

Rule 404 (b) is one of inclusion, which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition....Evidence of Heath's prior arrest and of his brother's past misdemeanor convictions were probative of their bias... Id at 259

This Court should review the 9th Circuit to insure respect for an accused's right to cross examination.

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2. Heath v. Cast 813 F.2d 254, 253 (9th Cir. 1987); U.S. v. Calle, 822 F.2d 1016 (11th Cir. 1987); U.S. v. Normandeau 800 F.2d 953, 957 (9th Cir. 1986); U.S. v. Tebha 770 F.2d 1454, 1456 (9th Cir. 1985); U.S. v. Collins 764 F.2d 647, 653 (9th Cir. 1985); U.S. v. Winters 729 F.2d 602, 605 (9th Cir. 1984; U.S. v. Winn 767 F.2d 527, 531 (9th Cir. 1985); U.S. v. Noti 731 F.2d 610, 612 (9th Cir. 1984).

IV. CONCLUSION

MR. MUSLIU was denied a fair trial when the jury was exposed to a prejudicial accusation against MR. MUSLIU, for the first time, during deliberation. The accusation was the only evidence that MR. MUSLIU knew of cocaine before traveling to Seattle. Since played out of context, it gave the false impression it was adopted. Since the jury was first exposed during deliberation, MR. MUSLIU was never given the chance to cross-examine or place the accusation in context. The jury convicted within minutes of hearing the accusation. Nothing could be more devastating to a fair trial or more severely tarnish the appearances of justice.

The 9th Circuit applied the wrong standard to find harmless error. Instead of applying the test of "reasonable possibility of prejudice" and viewing the evidence most favorable to the defense, the 9th Circuit gave the burden to MR.

MUSLIU and viewed the evidence in the light most favorable to the Government. By presuming the jury believed Stringfellow, and construing the record favorable to the Government, the 9th replaced the jury with it's personal opinion, and ignored this Court's rulings in U.S. v. Marshall, supra; Turner v. Louisiana, supra, Francis v. Franklin, supra; and Connecticut v Johnson, supra.

The 9th Circuit further erred, by precluding the defense from exploring Stringfellow's criminal record to show the desperate motive to set up MR. MUSLIU. This went to the heart of the defense and the right to confront Stringfellow's motive to lie.

An impartial jury is the cornerstone of a fair trial. Where the integrity of the jury is blemished -- by exposure to prejudicial evidence during deliberation -- a strict standard of review must be adopted. A new trial should be

ordered whenever a "reasonable possibility of prejudice" results. The Government should be given the burden to show the absence of prejudice, viewing the evidence in the light most favorable to the defense. This Court should review this case and enforce this strict standard to insure the harmless error rule does not become a shabby substitute for the historic right to an impartial jury.

RESPECTFULLY SUBMITTED this 7th day of August, 1989.

Wm P Bryson

for WALTER SHARE
7414 Orin Court North
Seattle, Washington 98103

Wm P Bryson

WILLIAM P. BRYSON
810 West Second Avenue
Anchoage, Alaska 99501

Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. NJAZI M. MUSLIU, a/k/a JESSE, Defendant-Appellant.	FILED APR. 10, 1989 Cathy A. Catterson Clerk US Court of Appeals Number 88-3009 DC # CR87-104-JMF

MEMORANDUM

Before: NELSON, BOOCHEVER, and BRUNETTI, Circuit Judges.

Njazi M. Musliu appeals his conviction for interstate travel with intent to carry on an unlawful activity, the sale or distribution of cocaine, in violation of 18 U.S.C. Section 1952.

Musliu contends that the extrinsic evidence improprly presented to the jury during deliberations was prejudicial. In addition, he claims that the district court erred in refusing to admit evidence of the government witness's prior conviction and that the indictment should have been dismissed because the government deliberately misled the grand jury. We affirm.

FACTS

Michael Stringfellow, the principal government witness, worked for Musliu as a "mule," a person who transports drugs on behalf of another. Michael made trips to other states and to Europe to purchase and transport cocaine, and was paid by Musliu for each trip. On one occasion, Michael gave the cocaine to the wrong person, and Musliu was not paid. After this incident, Michael and Musliu were not on good terms with each

other. During this time, Musliu took possession of Michael's jeep.

Because of his animosity towards Musliu, Michael went to the Snohomish County, Washington, authorities and told them about the situation with Musliu. Michael was also motivated by a possibility of obtaining some help for his brother, Patrick, who was facing a drug charge in Snohomish County, although no guarantees were ever given that Patrick would not be charged if Michael cooperated. The Snohomish County police referred Michael to the F.B.I.

Michael phoned Musliu's body shop and said he was upset about the missing jeep and would contact law enforcement authorities if he did not get a response within 48 hours. Musliu then offered to provide Michael with a plane ticket to Anchorage and money for gas to drive the jeep home to Washington. Using the

airplane ticket provided by Musliu, Michael then flew to Alaska with his brother Patrick and retrieved his jeep. Musliu and Michael discussed rectifying the situation regarding Michael's debt to Musliu for the cocaine from the last trip, and Musliu said Michael could probably make some drug trips and things would be squared away. Musliu asked the Stringfellow brothers to stop by Edmonton, Alberta, Canada to pick up a suitcase of clothes. Musliu gave the brothers $341 for expenses and he also told them to collect $1,000 Canadian owed to him in Edmonton and keep it.

Before leaving Anchorage, the Stringfellow brothers noticed that a window on the jeep would not roll down completely, and discovered a package of cocaine hidden in the door panel. The brothers then notified the F.B.I. and the cocaine was confiscated.

The Stringfellows returned to Washington without making the scheduled stop in Edmonton to pick up the suitcase. After reaching Washington, the brothers called Musliu who made plans to fly down. Three weeks later, Musliu flew to Washington and Michael met him at the airport. Michael testified that at that time, Musliu told him about the cocaine in the jeep. Arrangements were made to retrieve the jeep which Michael said had been given to a friend to whom he owed a debt. The next day, Michael was wired with a tape recorder by the F.B.I., and a bag of white powder was planted in the jeep's door panel. Michael took Musliu to the jeep in Marysville, Washington. The conversations between Michael and Musliu on the way to the jeep were recorded. Musliu was arrested as he took the bag of white powder out of the door panel of the jeep.

Prior to trial, Musliu moved to dismiss the indictment based on prosecutorial misconduct before the grand jury. The court took the motion under advisement until after trial and then denied the motion.

Musliu was tried and the jury returned a guilty verdict. At the trial, tape recorded excerpts of the conversation between Michael and Musliu during the drive to the jeep were played to the jury. During jury deliberations, the excerpts were replayed, but the tape was allowed to continue to a point beyond where it stopped at trial, and the jury heard the following additional statement by Michael: "You're a God damn body man, you know more about hidin' the shit than I would." Following the trial, Musliu filed a motion for a new trial based on the improper introduction of new evidence before the jury

during deliberations. The district court denied the motion.

ANALYSIS

1. THE EXTRINSIC STATEMENT

The denial of a motion for new trial pursuant to Fed. R. Crim. P. 33 is reviewed for an abuse of discretion. See United States v. Steel, 759 P.2d 706, 713 (9th Cir. 1985). The appellant carries a significant burden to show that the trial court abused its discretion in denying the motion for a new trial. Id.

Musliu contends that the additional tape-recorded statement by Michael was extrinsic evidence, and that his rights to a fair jury, a fair trial, cross-examination, and closing argument were denied when the statement was presented to the jury for the first time during deliberation.

A jury must decide a case only on the evidence presented at trial. Turner v. Louisiana, 379 U.S. 466, 472 (1965). Turner involved possible prejudice created when the state's leading witnesses were the same two sheriffs who watched over the jury during the trial. The court held that "[t]he requirement that a jury's verdict 'must be based upon the evidence developed at trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Id. In order to ensure that the defendant is given a fair trial, "at the very least the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Id. at 472-73. Although Turner did not involve extrinsic evidence introduced

during deliberations, we have held that Turner would apply in such a case. Gibson v. Clanon, 633 F.2d 851, 854 (9th Cir. 1980), cert. denied, 450 U.S. 1035 (1981).

When the jury obtains extrinsic evidence, a new trial should be granted unless "it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." Gibson, 633 F.2d at 855. Stated another way, we must reverse unless we can find that the error was "harmless beyond a reasonable doubt." United States v. Tebha, 770 F.2d 1454, 1456 (9th Cir. 1985).

In Tebha, the defendant was convicted of possession of heroin with the intent to distribute. During jury deliberations, a chemical analysis report on the heroin was improperly given to the jury. The report was the only evidence on the purity of the heroin. The report stated that the heroin was

almost pure. The court found that the error of submitting the report to the jury was not harmless as it was relevant to whether the defendant intended to "cut" the heroin and distribute it to others. Id. at 1456. The report was prejudicial because it was the only evidence on a relevant issue and may have influenced the jury to convict. Because the other evidence against Tebha was "far from overwhelming" and the extrinsic evidence was prejudicial, the court could not conclude that the error was harmless beyond a reasonable doubt. Id.

In United States v. Brown, 832 F.2d 128 (9th Cir. 1987), 832 F.2d 128 (9th Cir. 1987), the jury listened to a replay of a tape without the defendant or his counsel present. Because neither Brown nor his counsel were present during the replay, we held there was a possibility that extrinsic evidence was

introduced in the form of a nod in a significant place on the part of the agent running the tape machine. This possibility that harmful extrinsic evidence was introduced during deliberations was sufficient to warrant a new trial. Id. at 130.

On the other hand, the introduction of extrinsic evidence did not require a new trial in United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982). Bagnariol was convicted as a result of a government sting operation where a government agent posed as the representative of a fictitious corporation. Bagnariol claimed, as part of his defense, that he believed the corporation was valid. One of the jurors in the case visited a library during the trial and consulted several business publications to determine if information on the legitimacy of the

corporation was readily available to Bagnariol. The juror then reported his findings to several other jurors. Applying the standard that a new trial was necessary if there existed a reasonable possibility that this evidence could have affected the verdict, the court found that the extrinsic evidence failed to warrant reversal. Id. at 887. See also United States v. North, 746 F.2d 627, 632 (9th Cir. 1984), cert. denied, 470 U.S. 1058 (1985); United States v. Halbert, 712 F.2d 388, 389 (9th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

The statement here was extrinsic as it was presented to the jury for the first time during deliberations. Musliu contends that the tape recorded comment made by Michael to Musliu saying, "You're a God damn body man, you know more about hidin' the shit than I would," was prejudicial because it might have

led the jury to conclude Musliu hid the cocaine in the jeep, and thus knew about the cocaine before he left Alaska. Musliu was charged with traveling in interstate commerce with the intent to "carry on an unlawful activity, to wit: the sale or distribution of cocaine." The government was thus required to prove that the trip from Anchorage to Seattle was made with that intent. Musliu argues that the jury could have found that his trip was for a legitimate purpose and that only after his arrival in Seattle did he become aware that there was cocaine in the jeep. He contends that the jury could disbelieve Michael's testimony that it was Musliu who first mentioned the cocaine at the Seattle airport. We must reverse unless we can determine beyond a reasonable doubt that the extrinsic evidence did not contribute to the jury's verdict that the travel was with the

requisite intent. The reasons for the jury to believe that Musliu had an unlawful intent when he undertook the trip, however, are overwhelming.

An hour after Michael phoned Musliu and threatened to go to the authorities if he didn't get his belongings back, Musliu offered to pay Michael's airfare and traveling expenses to come to Alaska and retrieve the jeep. Musliu also paid $341.00 for gas for the trip to Edmonton and then Washington, and told Michael he could collect $1,000 Canadian in Edmonton. It is unlikely that Musliu would offer to pay Michael for his trip unless he was using Michael to transport the hidden cocaine to Edmonton.

After the Stringfellows arrived in Washington, Michael picked Musliu up at the airport. Michael testified that the first thing Musliu said to him at the airport was

that there was cocaine in the jeep. When Michael then expressed anger at the possibility that he could have been arrested while crossing the border with the drugs, Musliu explained that Michael could have told the authorities the jeep had been stolen and that they knew nothing about the drugs and the authorities would have let them go. Michael also testified that Musliu was "uptight" when informed that Michael no longer had possession of the jeep, indicating that he was concerned about losing the drugs.

Musliu, who did not testify, argues that the jury could well have disbelieved Michael because of his admitted effort that in their airport conversation, Michael informed Musliu that there was cocaine in the jeep. Further evidence of Musliu's knowledge, however, is found in the tape recorded conversations between Michael and Musliu which were properly

presented at trial. Michael told Musliu that "the bad part of it is, you gotta ... make an extra trip just to come down and ... do it over again" and Musliu replied, "I can't believe it. That's, that's hell." Michael then mentioned that Musliu also paid the gas money to have it "shipped out." Musliu made no denial. This conversation indicates that Musliu: knew the drugs were being transportedd; had paid the Stringfellows, not for gas, but to carry the drugs; and would have to pay again to transport the drugs because they did not stop in Edmonton as planned.

Musliu expressed regret about problems caused by the absence of the jeep the previous day. Musliu and Michael also discussed their mutual surprise at the airport: Musliu when he learned that the jeep was not in Michael's possession and Michael when he learned there

were drugs in the jeep. These exchanges also show Musliu had knowledge of the cocaine when he flew to Washington. 1/

1/ The recorded exchanges between Michael and Musliu (referred to as Jesse) included the following:

Jesse: ... Get this shit out of the Jeep, leave it somevhere, and, I brought some people from. They vaited all day, ya know, yesterday for this shit.
Michael: Uh huh.
Jesse: And you wanna give something to these people and take off.
Michael: Uh huh.
Jesse: I didn't expect this shit to go wrong. Son of a bitch. -

...

Michael: No. No, I told ya I'd like to have a picture of your fuckin' face and a picture of my fuckin' face and the two different looks we had.
Jesse: Surprise.
Michael: Do an instant replay, huh?
Jesse: Man, ya know, as long as it gets back, it's in there. Nobody can get it out of there. It's, it's, in perfect spot. I just, ah, hope, ah, he got the Jeep.

When Michael and Musliu arrived at the jeep, Musliu went straight to the door where the cocaine was hidden and retrieved it, indicating knowledge of the cocaine's location.

The extrinsic evidence added little, if anything, to the jurors' knowledge that Musliu was an experienced autobody repairman who would best know how to hide the cocaine in the jeep. In fact, before the unauthorized portion of the tape was played to the jury, the government presented this very argument to the jury. The prosecuting attorney quoted from the portion of the tape previously played to the jury:

> ... [Musliu]: Man, you know, as long as it gets back, it's in there. Nobody can get it out of there. It's in perfect spot. I just, ah, hope, ah, he got the jeep.

The government then argued:

> He's a body man, and he says it's in the perfect spot. Nobody can get it out of there.

It is also undisputed that the cocaine was first discovered while the jeep was in Alaska immediately after the Stringfellows obtained it from Musliu. While Musliu argues that someone else may have placed the cocaine in the jeep and that he did not know about it until after he arrived in Seattle, such an explanation is highly suspect.

Giving consideration to all of the circumstances, we conclude that beyond a reasonable doubt the extrinsic statement could not have affected the jury's verdict. Thus the district court did not abuse its discretion by denying Musliu's motion for a new trial based on the extrinsic evidence.

2. EVIDENCE OF THE STRINGFELLOW'S PRIOR CONVICTIONS

A trial court's decision to exclude evidence of prior crimes should not be overturned absent an abuse of discretion. See United States v. Feldman, 788 F.2d 544, 557 (9th Cir. 1986), cert. denied, 479 U.S. 1067 (1987).

Musliu argues that the trial court should have permitted evidence of Patrick and Michael Stringfellow's criminal records. He argues that evidence of Michael's knowledge of Patrick's prior offenses is relevant to Michael's motive to implicate Musliu.

Evidence probative of motive and bias that is not more prejudicial than probative is admissible on the issue of a witness's credibility. See Heath v. Cast, 813 F.2d 254, 259 (9th Cir.), cert. denied, 108 S.Ct. 147 (1987). Although the evidence of Patrick's

prior convictions has some relevance to Michael's credibility. His reasons for cooperating with the authorities were fully explored at trial. He discussed the charge pending against Patrick and admitted he was motivated by that charge. Evidence of Patrick's prior convictions would have added little.

There was no violation of Musliu's right to cross-examine here. The district court's refusal to allow Musliu to explore Michael's knowledge of Patrick's prior convictions was not error because "the jury had in its possession sufficient information to appraise the biases and motivations of the witness." See Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980)(quoting United States v. Bleckner, 601 F.2d 382, 385 (9th Cir. 1979)). Thus the district court did not abuse its discretion by excluding this evidence.

Musliu next argues that evidence of Michael's 1971 conviction for petty larceny should have been admitted under Fed. R. Evid. 609(a)(2). Rule 609(a)(2) allows evidence of convictions for crimes of "dishonesty or false statement" for the purpose of attacking the credibility of a witness. Evidence of such a conviction is not admissible if a period of more than ten years has elapsed from the date of conviction or release from confinement, unless the "court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b).

Even if Musliu were to overcome the time bar, the court's refusal to allow the testimony was not error. Larceny is not a crime involving "dishonesty or false

statements." In United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977), the court noted that Rule 609 included only:

> "crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimin falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."

Id. at 806 (quoting Conference Report, H.R. No. 93-1597, reprinted 3 Weinstein's Evidence, 609-39 (1976)). Similarly, United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982), held that:

> Generally, crimes of violence, theft crimes, and crimes of stealth do not involve "dishonesty or false statement" within the meaning of Rule 609(a)(2). Although such crimes may indicate a lack of respect for the persons or property of others, they do not "bear directly on the likelihood that the defendant will testify truthfully."

Id. at 1273 (emphasis in original)(internal

citation omitted)(quoting United States v. Hayes, 553 F.2d 824, 827 (2nd Cir.), cert. denied, 434 U.S. 867 (1977)).

A conviction for theft may be admissible under Rule 609 if it was committed by fraudulent or deceitful means. Glenn, 667 F.2d at 1273. The defendant here would have the burden of presenting evidence concerning the manner in which the offenses were committed. Musliu has failed to present any such evidence. Michael Stringfellow's conviction for petty larceny was not admissible as a crime relating to dishonesty or false statements.

3. GRAND JURY TESTIMONY

Whether an indictment should have been dismissed based on outrageous government conduct is a question of law subject to de novo review. United States v. Williams, 791 F.2d 1383, 1386 (9th Cir.), cert. denied, 479

U.S. 869 (1986). Therefore, allegations of prosecutorial misconduct before a grand jury are reviewed de novo. See United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1392 n.9 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984).

Because the grand jury's duty is only to determine whether probable cause exists to believe the crime has been committed, we have held that "[d]ismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way, as where perjured testimony has knowingly been presented." United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978). Additionally, the misrepresentations, if found, must be material to justify dismissal of the indictment. See United States v. Flake, 746 F.2d 535, 538 (9th

Cir. 1984), cert. denied, 469 U.S. 1225 (1985); United States v. Bracy, 566 F.2d 649, 654-55 (9th Cir. 1977), cert. denied, 439 U.S. 818 (1978). Even if there has been a material misrepresentation, if there is sufficient truthful testimony to support the indictment, the courts will not dismiss the indictment. United States v. Claiborne, 765 F.2d 784, 791 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

During the grand jury investigation, Special Agent Hastie was asked about the "background, as far as any criminal offenses" of the Stringfellow brothers. Hastie replied that Michael was "free of any criminal history" and that he was "not sure about his brother" but that he didn't "think so also." Musliu also cites Hastie's answer to a question about Michael's motivation to contact the authorities. Hastie told the grand jury

about the June drug transaction that went bad but he failed to state that Michael was also motivated by the possibility of helping Patrick out of his pending drug charge. Finally, Musliu contends that Hastie's failure to tell the grand jury that Musliu attempted to roll down the window before retrieving the package contributed to the "unfairness of the grand jury."

The statements or omissions in question here were not material. The grand jury does have a duty "to determine whether the charge was founded on credible testimony or was dictated by malice or personal ill will." United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974)(Hufstedler, J., concurring). The evidence of Michael's former conviction, however, was not admissible at trial, and was not material to the grand jury's assessment of his credibility. Moreover, the grand jury was

fully informed that both Michael and Patrick had participated in drug activities in the past. This is not one of the "flagrant cases" where dismissal of the indictment is required.

For these reasons, we AFFIRM.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	FILED
Plaintiff-Appellee,	)	JUNE 8, 1989
	)	
vs.	)	C.A. CATTERSON
	)	CLERK
NJAZI M. MUSLIU, aka JESSE,	)	U.S. COURT
	)	OF
Defendant-Appellant.	)	APPEALS
	)	

No. 88-3009
DC No. CR-87-104 JMF

ORDER

BEFORE: NELSON, BOOCHEVER, and BRUNETTI, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Nelson and Brunetti reject the suggestion for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.